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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re S.K. et al., Persons Coming Under the
Juvenile Court Law.

B211705
(Los Angeles County Super. Ct.
No. CK73688)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.K.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Levin, Juvenile Court Referee. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Senior Associate County Counsel, for Plaintiff and Respondent.

S.K. (father) appeals from the judgment of October 2, 2008, declaring his daughter and son (the children),¹ dependents of the court under Welfare and Institutions Code section 300.² Father contends substantial evidence does not support the jurisdictional findings. We hold substantial evidence supports the findings. To the extent father contends substantial evidence does not support removal of the children from his custody, we hold he has forfeited the issue by agreeing to the removal order in the dependency court. Accordingly, we affirm the judgment.

STATEMENT OF FACTS AND PROCEDURE

Daughter was born in November 2001 to S.M. (mother), who was a minor, and father, who was incarcerated. Father had lost custody of two other children of a previous relationship. Mother had a history of substance abuse. Father had a 20-year history of anti-social behavior, including gang involvement, drugs, violence, and spousal abuse. Father's nickname was "K Dog," and he was a member of the Crips gang; he was shot on two occasions. His criminal convictions include: 1986—selling marijuana; 1986—attempted burglary; 1987—battery with serious bodily injury; 1987—battery with serious bodily injury; 1992—infliction of corporal injury on a spouse; 1995—infliction of corporal injury on a spouse; 1996—driving while license suspended; 1997—felon in possession of a firearm; 1999—infliction of corporal injury on a spouse; 2002—resist executive officer; 2002—sexual intercourse with a minor; 2002—damage jail or prison; 2004—felon in possession of a firearm; 2006—keeping a place for the sale of narcotics; and numerous violations of parole. Father was incarcerated multiple times after daughter's birth. In May 2001, he was returned to prison to finish a three-year prison sentence for violation of parole and was in prison when daughter was born. In March

¹ The dependency court found father was the children's presumed father.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

2002, he was sentenced to 365 days in jail upon his conviction of sexual intercourse with a minor. In May 2002, a bench warrant was issued and he was sentenced to 16 months in prison. In December 2002, he was placed on probation for a period of 36 months, conditioned on serving 428 days in jail, upon his conviction of damage jail/prison. In October 2004, he was sentenced to two years in prison upon his conviction of felon in possession of a firearm. In August 2006, he was placed on probation for a period of 36 months, conditioned on service of 365 days in jail, following his conviction of maintaining a location to sell narcotics.

Daughter was a prior court dependent in another county due to mother's substance abuse. In that case, she was removed from the parents' custody and mother was ordered to participate in drug rehabilitation.³

In 2006, mother and father married. Daughter lived in their home.⁴ The family was unable to maintain stable housing. The parents used marijuana, and father also took prescription narcotic drugs. In August 2007, mother obtained a recommendation for medical marijuana for anxiety and depression from Dr. William Eidelman pursuant to the Compassionate Use Act. On August 9, 2007, father was arrested for possession of a controlled substance under Health and Safety Code section 11377, subdivision (a). Prosecution was deferred for revocation of parole. The record does not indicate the disposition of the matter. In approximately September 2007, father obtained a recommendation for medical marijuana from Dr. Eidelman. In October 2007, after writing father one last prescription for extra strength Vicodin, the doctor father had been seeing since 2000 refused to prescribe any more pain medication and advised him to go

³ The record does not indicate when daughter was adjudicated a dependent in the prior proceeding. Daughter's two maternal half-siblings, born in 1999 and 2002, were also court dependents in daughter's case. Mother did not rehabilitate herself. The two maternal half-siblings were adopted in 2006.

⁴ How daughter came to be living in the home of mother and father again and the status of daughter's legal custody as of the date she was detained in the current case are matters that were not well-documented below. The record does not contain the minute orders from daughter's prior case. The dependency court declined to obtain them.

to a pain management clinic. In May and June 2008, father obtained prescriptions for extra strength Vicodin, Neurontin, and Adalat from a doctor at an urgent care facility before the doctor told him to go to physical therapy for his pain management.

Son was born in July 2008. As mother testified positive for marijuana at son's birth, the children were detained in a foster home and a dependency petition was filed.

Father told two social workers from the Department of Children and Family Services that he and mother smoked marijuana "for pleasure." He stated he had been taking Vicodin for pain since 1994 and was probably addicted to it because it no longer controlled his pain. He currently used marijuana for pain. He stated he left some very appetizing marijuana cakes and a marijuana chocolate syrup drink on the kitchen counter a few days before son was born. Daughter was in the home at the time. He believed mother ate some of the cakes without realizing they contained marijuana. Father told social workers he used to physically abuse mother. He would grab her arm and "smack[] [her] around." The most recent incident occurred 15 months earlier. He stated daughter was always in her room during these incidents. Father agreed to participate in a random drug test the day the children were detained, but failed to do so.

In other statements, father denied telling a social worker he hit mother, left a marijuana cake on the kitchen counter, or smoked marijuana for pleasure. He explained he had been awake for three days at the time of the interview. He stated he put the cakes on top of the refrigerator so daughter could not reach them. He testified he never hit mother.

Father told the social worker he and mother had current medical marijuana licenses. Mother's was for anxiety and depression, and his was for pain. Father admitted he previously used marijuana for pleasure. Father stated he used marijuana, Vicodin, Norco, and Neurontin for pain. Father believed that neither he nor mother had done anything that required them to attend parenting, counseling, or drug testing. He testified concerning his marijuana use at home prior to the children's detention. He usually smoked, but not daily, in the bathroom when daughter was asleep or not at home. He kept marijuana edibles on the refrigerator.

W.K. (paternal aunt) testified father had been using marijuana for many years. He physically abused his former wife ten years earlier and was incarcerated as a result. Daughter disclosed to paternal aunt and foster mother that she saw the parents fight, including fighting with their fists. The parents and daughter told paternal aunt that in 2007-2008, daughter broke the family's pet rabbit's neck, drowned a guinea pig, and killed a duck. Father denied daughter intentionally killed any animals. In June 2008, father threatened paternal aunt, because she had said mother was not a good mother.

A friend of the parents testified she saw the parents under the influence two to three times in the year after June 2007.

Concerning events after the children were detained, paternal aunt stated that she observed mother smoke marijuana after dependency proceedings were commenced. Moreover, she observed drug paraphernalia in the parents' home, and the parents had an argument which escalated to the point mother threw an object. Paternal aunt witnessed the parents having a very volatile fight on the street. She testified father told her that mother likes to egg him on when they fight so that father will hit her and they can have make-up sex. The apartment manager told paternal aunt she heard fighting all the time in the parents' apartment and the parents would have to move out. Paternal aunt testified father threatened her on August 1, 2008, that she would be sorry if she testified at the dependency hearing. Father denied paternal aunt's reports. Both daughter and foster mother told the social worker that, on July 23, 2008, daughter threatened foster mother's grandson with a knife. Father called daughter's foster parent and threatened her with harm. In July 2008, Dr. Eidelman wrote a letter recommending marijuana for mother for post-traumatic stress disorder brought on by an event that occurred when mother was nine years old.

On August 1, 2008, the dependency court sustained allegations under section 300, subdivisions (b) and (j): mother has a history of substance abuse, is a current marijuana abuser, used illicit drugs during her pregnancy with her son, and continued to use drugs despite being ordered to participate in drug rehabilitation; daughter is a prior dependent of the court in San Bernardino County; father knew of mother's substance abuse and

failed to protect their son; father has a history of substance abuse, is a current abuser of marijuana and prescription medication, and left the marijuana in a place where it was within daughter's reach; and the parents have a history of engaging in angry verbal altercations; on one prior occasion, father angrily grabbed mother and such conduct by the parents endangers the children.

Dr. Eidelman testified at the hearing that a recommendation for medical marijuana is open-ended: "you write the letter of recommendation. It's kind of up to [the patient] not to abuse it, and there's really no control that the doctor has." He also testified that he would recommend a pregnant woman to smoke marijuana, in some circumstances; exposure to marijuana smoke does not cause children physical or emotional harm; and smoking medical marijuana can make a parent a better parent. The dependency court did not accept Dr. Eidelman's approach: "Dr. Eidelman . . . believes marijuana is a panacea for anything and everything, and only begrudgingly admitted that it might be harmful to kids, and it looks like he would prescribe marijuana to anyone that would walk into his office." Dr. Eidelman even recommended medical marijuana for mother, "although nobody ever mentioned mother having any kind of medical condition where she would benefit from using marijuana." The dependency court found from "the totality of the evidence" that father was overprescribed. "He goes to different doctors . . . so that he can get what he considers enough medication for his condition. . . . [One] doctor has recommended father look into other . . . ways of managing his pain so that he would not be prescribed so much pain medication. [¶] . . . [¶] . . . I don't consider [father to have] a true medical need [for marijuana]."

At a visit on September 30, 2008, father was very aggressive, confrontational, and intimidating toward the staff of the foster family agency. Father spoke about case issues and the foster parent in front of daughter, which upset daughter. Father did not enroll in either an outpatient drug program or individual drug counseling. He and mother missed drug tests and tested positive for cannabinoids on September 18, 2008. The dependency court ordered the parents to enroll in a substance abuse program and father to participate in pain management pending the dispositional hearing.

The dispositional hearing was held on October 2, 2008. Father came to court before the hearing and settled the matter, signing the disposition case plan the Department recommended.⁵ The case plan included a suitable placement⁶ order and monitored visits. Father did not stay for the hearing. Counsel did not contest the Department's recommendations for disposition. The children were declared dependents of the court. Custody was taken from the parents and reunification services ordered. Father was ordered to participate in drug rehabilitation, parenting, and individual counseling. Father was granted monitored visitation in the Department's office, with the Department having discretion to liberalize.

DISCUSSION

Substantial Evidence Supports the Findings Under Section 300, subdivision (b)

Father contends substantial evidence does not support the findings under section 300, subdivision (b), that he was a current abuser of prescription drugs and marijuana, the children were currently at risk of harm from father's drug use and the parents' domestic violence, and father knew of mother's drug abuse and failed to protect son. We disagree with the contention.

"In reviewing the jurisdictional findings and the disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and

⁵ The dependency court stated, without contradiction by father, "I see [the matter] has settled."

⁶ A suitable placement order means that custody of the children has been taken from the parents and given to the Department. The order requires the Department to suitably place the children in out-of-home care.

credibility are the province of the trial court. [Citation.]” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

Section 300, subdivision (b) describes, inter alia, a child who has suffered or is at substantial risk of suffering serious physical harm or illness as a result of “the failure or inability of [the] parent or guardian to adequately supervise or protect the child, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse.” “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) A past infliction of harm may establish a substantial risk of harm if there is “‘some reason to believe the acts may continue in the future.’ [Citations.]” (*Ibid.*)

The purpose of the juvenile court law is to provide “maximum safety and protection for children” being harmed or who are at risk of harm. (§ 300.2.) “The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.” (*Ibid.*) Marijuana is a hallucinogenic substance. (Health & Saf. Code, § 11054, subd. (d)(13).) “There is a risk to . . . children of the negative effects of second hand marijuana smoke. [¶] . . . [U]se of marijuana near others can have a negative effect on them. [¶] . . . [L]egal use of marijuana can be abuse if it presents a risk of harm to minors.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.)

The Compassionate Use Act of 1996, which protects patients who use marijuana for medical purposes from criminal prosecution, provides in pertinent part: “Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others.” (Health & Saf. Code, § 11362.5, subd. (b)(2).)

“[We note] the obvious: Domestic violence against a spouse is detrimental to children.” (*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 940.) Domestic

violence indicates there is a substantial risk the children will suffer serious physical injury, because children of fathers who abuse their spouses are likely to be physically abused themselves. (*In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.) Further, domestic violence in the household creates a substantial risk the children will encounter the violence and suffer serious physical harm therefrom. (*In re Heather A.*, *supra*, 52 Cal.App.4th at p. 194; see also *In re Basilio T.* (1992) 4 Cal.App.4th 155, 168-169.)

Father's Substance Abuse

Father's criminal record and statements, paternal aunt's testimony that father had been using marijuana for years, and the fact father did not have a medical marijuana recommendation until 2007 establish father had a long history of illegal marijuana use. It is reasonable to infer that father did not need marijuana to control his pain, from the evidence that one of his doctors told him he could control the pain through physical therapy. The fact that Dr. Eidelman, who the dependency court found would prescribe marijuana for anyone and everyone who walked into his office, recommended father use marijuana for his pain does not establish marijuana use was necessary. Thus, the dependency court could reasonably infer father's frequent, continued marijuana use was drug abuse. Moreover, father's admission he ingested marijuana for pleasure, and the absence of any indication he had completed drug rehabilitation, support the conclusion of continued marijuana abuse.

The allegation father was a current abuser of prescription medication is supported by the following evidence. Father stated Vicodin no longer controlled his pain and he was probably addicted to it. Two of his doctors refused to continue prescribing Vicodin and the other narcotics he was taking. One doctor referred him to physical therapy to manage his pain instead of prescribing drugs for him. Father obtained prescriptions for Vicodin and other narcotics as recently as May and June 2008. This is substantial evidence that father currently abused Vicodin and other prescription narcotic drugs. The

testimony of a friend of the parents that she had seen the parents under the influence several times since June 2007 further establishes current drug abuse.

Apart from whether medical marijuana is appropriate for his medical condition, there is substantial evidence father's drug use created a risk of harm to the children. He left appetizing marijuana-laced cakes and drinks on the kitchen counter where they were accessible to daughter, who was at home. Son was exposed to the marijuana because mother, pregnant with son, ingested the food. Leaving treats containing marijuana exposed on the top of the family refrigerator, which is where father testified he normally left them, does not safeguard the marijuana from a six and a half year old child. Further, father admitted smoking marijuana in the bathroom of the home when daughter was there. Smoking marijuana, a hallucinogen, in a home where children live creates a risk of harm to the children. (See Health & Saf. Code, § 11054, subd. (d)(13); *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 452.)

Domestic Violence

Substantial evidence supports the finding the children were at a current risk of harm from the parents' domestic violence. Father had three convictions for infliction of spousal abuse between 1992 and 1999. The record contains no indication father participated in a domestic violence rehabilitation program. Father told two social workers he would smack mother around when daughter was present in the home. Daughter disclosed she saw the parents engage in fights with their fists. Paternal aunt observed very volatile domestic violence between the parents, including object-throwing, shortly after the children were detained. Father admitted to paternal aunt that he and mother would fight, stating mother liked to incite father to hit her. Domestic violence is detrimental to children and creates a risk of physical and emotional harm. Daughter exhibited aggressive, violent behaviors, including killing small animals and threatening a boy with a knife. This is substantial evidence the circumstances at the time of the

dependency hearing subjected the children to a risk of harm from the parents' domestic violence.

Failure to Protect

Substantial evidence supports the finding the children were at risk of serious physical harm in that father knew of mother's substance abuse and failed to protect son. As father was a party in the previous dependency case involving daughter, he knew of mother's long-standing drug abuse problem and her failure to rehabilitate herself. In 2007, mother asked the same medical marijuana doctor used by father for a recommendation for medical marijuana. Father told the social worker mother had a current medical marijuana license. A friend of the parents testified she observed mother and father under the influence several times in the year after 2007. This evidence shows that father was aware that mother desired to use, and did use, marijuana during the pregnancy with their son. Moreover, father told two social workers mother smoked marijuana for pleasure. Aware of mother's desire to continue to enjoy using marijuana during the pregnancy, father left appetizing marijuana treats out in the kitchen throughout her pregnancy with their son, easily accessible to mother. The parents both admitted mother ate some of these treats late in the pregnancy. The foregoing is strong evidence father knew mother used marijuana and failed to protect their son. Moreover, father tried to cover up for mother by maintaining she ate the treats inadvertently, and he asserted she does not need drug rehabilitation. This is evidence the risk caused by father's failure to protect will continue in the future.

Section 300, subdivision (j)

Father contends substantial evidence does not support the finding under section 300, subdivision (j),⁷ in that there is no evidence of a current risk to the children from mother's substance abuse. We need not decide the issue, as substantial evidence supports jurisdiction over the children under section 300, subdivision (b). Insufficient evidence to sustain jurisdiction under one subdivision does not defeat dependency jurisdiction under another. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 451; *In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875.) "When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence." (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 451.)

Father Forfeited His Challenge to the Removal Order

Father contends that, even if substantial evidence supports the jurisdictional findings, substantial evidence does not support the order removing the children from his custody at the dispositional hearing. The Department contends father forfeited the issue by failing to object in the dependency court. Father replies that a challenge to the sufficiency of the evidence to support a finding is not forfeited by a failure to object below, citing *In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1237-1239 (submission of the jurisdiction determination on the court reports does not waive a parent's right to

⁷ Section 300, subdivision (j) provides in pertinent part, "The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions."

challenge on appeal the sufficiency of the evidence to support the jurisdictional findings). Father did not submit on the court reports. He agreed to the removal. By agreeing to the dispositional order removing the children from his custody, he forfeited the issue. (*Zinke v. Zinke Rebottoming Shoe Co., Inc.* (1962) 208 Cal.App.2d 690, 694-695 [“““It is an elementary and fundamental rule of appellate procedure that a judgment or order will not be disturbed on an appeal prosecuted by a party who consented to it.” . . .”].)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.